

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

Amendment and Compilation of Chapter 3-120
Hawaii Administrative Rules
June 1, 1999

SUMMARY

1. §§3-120-3 to 3-120-5 are amended.
 - a. §3-120-3. Expands the applicability of the rules.
 - b. §3-120-4. Revises the date of the exhibit.
 - c. §3-120-5. Allows CPO to approve the exemption for the term of the contract.
2. Chapter 3-120 Exhibit is amended.
3. Chapter 120 is compiled.

HAWAII ADMINISTRATIVE RULES

TITLE 3

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES

SUBTITLE 11

PROCUREMENT POLICY BOARD

CHAPTER 120

GENERAL PROVISIONS

§3-120-1	Purpose
§3-120-2	Definitions
§3-120-3	Applicability
§3-120-4	Procurements exempt from chapter 103D, HRS
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§3-120-1 Purpose. The purpose of these rules is to promote economy, efficiency, and effectiveness in the procurement of goods and services, and the construction of public works for the State and counties, by:

- (1) Simplifying, clarifying, and modernizing the law governing procurement;
- (2) Requiring the continued development of procurement policies and practices;
- (3) Making the procurement laws of the State and counties as consistent as possible;
- (4) Ensuring the fair and equitable treatment of all persons who deal with the procurement system of the State and counties;
- (5) Providing increased economy in procurement activities and maximizing to the fullest extent practicable the purchasing value of public funds;
- (6) Fostering effective broad-based competition within the free enterprise system;
- (7) Providing safeguards for the maintenance of a procurement system of quality and integrity; and

- (8) Increasing public confidence in the procedures followed in public procurement.
[Eff 12/15/95; comp 11/17/97; comp JUN 19 1999] (Auth: HRS §103D-202)
(Imp: SSLH 1993, Act 008, §1)

§3-120-2 Definitions. As used in subtitle 11:

"Administrator of the state procurement office", hereinafter referred to as "the administrator", means the administrator as provided in section 103D-204, HRS, or the administrator's duly appointed agent or representative.

"Bid" means the executed document submitted by a bidder in response to an invitation for bids, or a multi-step bidding procedure.

"Bidder" means any individual, partnership, firm, corporation, joint venture, or other entity submitting, directly or through a duly authorized representative or agent, a bid for the good, service, or construction contemplated.

"Change order" means a written order signed by the procurement officer, directing the contractor to make changes which the change clause of the contract authorizes the procurement officer to order without the consent of the contractor.

"Chief procurement officer" means the chief procurement officer for state entities and the several counties as provided in section 103D-203, HRS, or the officer's duly appointed agent or representative.

"Contract" means all types of agreements, regardless of what they may be called, for the procurement or disposal of goods or services, or for construction.

"Contract modification" means any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual action of the parties to the contract.

"Contractor" means any individual, partnership, firm, corporation, joint venture, or other legal entity undertaking the execution of the work under the terms of the contract with the State, and acting directly or through its agents or employees.

"Cost analysis" means the evaluation of cost data for the purpose of arriving at costs actually incurred or estimates of costs to be incurred, prices to be paid, and costs to be reimbursed.

"Cost data" means information concerning the actual or estimated cost of labor, material, overhead, and other cost elements which have been actually incurred or which are expected to be incurred by the contractor in performing the contract.

"Cost-reimbursement contract" means a contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provision of this chapter, and a fee, if any.

"Data" means recorded information, regardless of form or characteristic.

"Days" means calendar days unless otherwise specified.

"Designee" means a person appointed by the head of a purchasing agency to act on its behalf with delegated authority.

"Established catalogue price" means the price included in a catalogue, price list, schedule, or other form that is regularly maintained by a manufacturer or contractor; that is either published or otherwise available for inspection by customers; and that states prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the goods or services involved.

"Established market price" means a current price, established in the usual and ordinary course of trade between buyers and sellers, which can be substantiated from sources which are independent of the manufacturer or supplier and which may be an indication of the reasonableness of price.

"Head of the purchasing agency" means the head of any agency with delegated procurement authority.

"Invitation for bids" means all documents, whether attached or incorporated by reference, utilized for soliciting bids under the competitive sealed bidding source selection method.

"Offer" means bid, proposal, or quotation.

"Offeror" means any individual, partnership, firm, corporation, joint venture, or other entity submitting, directly or through a duly authorized representative or agent, an offer for the good, service, or construction contemplated.

"Paying agent" means, as to bonds of any particular series, the director of finance or the bank or trust company designated for the payment of the principal and redemption price (if any) of, and

interest on, the bonds or such series in the series resolution authorizing the issuance of such series or the series certificate relating to such series.

"Price analysis" means the evaluation of price data, without analysis of the separate cost components and profit as in cost analysis, which may assist in arriving at prices to be paid and costs to be reimbursed.

"Price data" means factual information concerning prices, including profit, for goods, services, or construction substantially similar to those being procured. In this definition, "prices" refers to offered or proposed selling prices, historical selling prices, and current selling prices of such items. This definition refers to data relevant to both the general contractor and subcontract prices.

"Procurement officer" means any person with delegated authority to enter into and administer contracts and make written determination with respect thereto. The term includes an authorized representative acting within the limits of authority. The delegated authority is received from the chief procurement officer directly or through the head of a purchasing agency or designee to the procurement officer.

"Proposal" means the executed document submitted by an offeror in response to a request for proposals.

"Request for proposals" means all documents, whether attached or incorporated by reference, utilized for soliciting proposals under the competitive sealed proposal source selection method.

"Responsible bidder or offeror" means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.

"Responsive bidder or offeror" means a person who has submitted a bid or offer which conforms in all material respects to the invitation for bids or request for proposals.

"Solicitation" means an invitation for bids, a request for proposals, a request for quotations, or any other document issued by the State for the purpose of soliciting bids or proposals to perform a state contract.

"State" means the judiciary, the legislature, office of Hawaiian affairs, department of education, University of Hawaii, division of community hospitals within the department of health, remaining departments

of the executive branch and all governmental bodies administratively attached to them, and the counties.

"Subcontractor" means any person who enters into an agreement with the contractor to perform a portion of the work for the contractor.

"Supplier" means prospective bidder or offeror.

"Support facility provider" means a bank, a national banking association, an organization subject to registration with the Board of Governors of the Federal Reserve System under the Bank Holding Company Act of 1956 or any successor provisions of law, a federal branch pursuant to the International Banking Act of 1978 or any successor provisions of law, a savings bank, a saving and loan association, an insurance company or association chartered or organized under the laws of any state of the United States of America, the Government National Mortgage Association or any successor thereto, the Federal National Mortgage Association or any successor thereto, or any other federal agency. [Eff 12/15/95; am and comp 11/17/97; comp JUN 19 1999] (Auth: HRS §103D-202) (Imp: HRS §103D-202)

§3-120-3 Applicability. These rules shall apply to:

- (1) The procurement practices of all entities created by the State's and counties' constitutions, charters, statutes, ordinances, administrative rules, or executive orders, including the office of Hawaiian affairs, and the departments, commissions, councils, boards, bureaus, committees, institutions, authorities, legislative bodies, agencies, government corporations, or other establishment or office of the executive, legislative, or judicial branches of the State or its several counties; and
- (2) All procurement contracts made by governmental bodies, whether the consideration for the contract is cash, revenues, realizations, receipts, or earnings, any of which the State receives or is owed; in-kind benefits; or forbearance; provided that nothing in this chapter or rules adopted hereunder shall prevent any governmental body from complying with the

terms and conditions of any other grant, gift, bequest, or cooperative agreement.
[Eff 12/15/95; am and comp 11/17/97; am and comp JUN 19 1999] (Auth: HRS §103D-202)
(Imp: SSLH 1993, Act 008, §1; HRS §§103D-102, 103D-111)

§3-120-4 Procurements exempt from chapter 103D, HRS. (a) Notwithstanding the intent of chapter 103D, HRS, to require governmental bodies to procure their goods and services through competitive bidding, it is acknowledged that there may be situations where procurement by competitive means is either not practicable or not advantageous to the State.

(b) An exhibit titled "Procurements Exempt From Chapter 103D, HRS" dated 06/01/99 is located at the end of this chapter. This exhibit provides a list of goods and services which the procurement policy board has determined to be exempt from chapter 103D, HRS, because although such goods and services may be available from multiple sources, their procurement by competitive means would be either not practicable or not advantageous to the State.

(c) Chief procurement officers may request periodic reports from the heads of purchasing agencies of procurements made pursuant to section (b). The heads of purchasing agencies may be required to include in their reports, descriptions of the process or procedures the agency used to select the vendor ensuring maximum fair and open competition whenever practicable.

(d) Chief procurement officers may on an annual basis request that additional exemptions be added to the exhibit.

(e) The procurement policy board shall review the exhibit annually for amendments.

(f) Purchasing agencies making procurements which are exempt from chapter 103D, HRS, are nevertheless encouraged to adopt and use provisions of the chapter and its implementing rules as appropriate; provided that the use of one or more provisions shall not terminate the exemption and subject the procurement of the purchasing agency to any other provision of the chapter.

(g) Purchasing agencies shall cite on the purchase order or on the contract, the authority waiver as "Exempt From Chapter 103D, HRS, pursuant to section

3-120-4(b) (cite exemption number from exhibit), Hawaii Administrative Rules". [Eff 12/15/95; am and comp 11/17/97; am and comp JUN 19 1999] (Auth: HRS §§103D-102, 103D-202) (Imp: HRS §103D-102)

§3-120-5 Procedures for requesting exemption.

(a) Prior to procurement, when the head of a purchasing agency determines that a situation exists wherein procurement by competitive means would be either not practicable or not advantageous to the State, a request to procure the good or service by exemption may be made to the appropriate chief procurement officer. The "Request for Exemption From Chapter 103D, HRS" form provided by the administrator shall include the following information:

- (1) An explanation describing how procurement by competitive means is either not practicable or not advantageous to the State;
- (2) Details of the process or procedures to be followed in selecting the vendor to ensure maximum fair and open competition as practicable; and
- (3) A description of the agency's internal controls and approval requirements for the exempted procurement, and a list of agency personnel, by position title, who will be involved in the approval process and administration of the contract.

(b) In determining whether to approve the "Request for Exemption From Chapter 103D, HRS", the chief procurement officer shall consider the circumstances of each individual case and may approve the exemption for the term of the contract.

(c) The chief procurement officer shall forward a copy of each approved and disapproved "Request for Exemption From Chapter 103D, HRS" to the administrator. [Eff 12/15/95; comp 11/17/97; am and comp JUN 19 1999] (Auth: HRS §103D-202) (Imp: HRS §103D-102)

§3-120-6 Record of procurement actions. The chief procurement officer shall maintain a record of all chapter 103D, HRS, exemptions pursuant to sections 3-120-4 and 3-120-5 for a minimum of five years. A report of the exemptions shall be submitted in accordance with section 3-122-211 to the legislature. The record shall be available for public inspection.

§3-120-6

[Eff 12/15/95; am and comp 11/17/97; comp
JUN 19 1999] (Auth: HRS §103D-202) (Imp: HRS
§§103D-102, 103D-321)

Amendments to and compilation of chapter 120, Title 3, Hawaii Administrative Rules, on the Summary page dated June 1, 1999 were adopted on June 1, 1999 following a public hearing held on May 11, 1999 in Kahului, Maui; May 12, 1999 in Honolulu, Hawaii; May 18, 1999 in Hilo, Hawaii; May 19, 1999 in Lihue, Kauai; and May 20, 1999 in Kailua-Kona, Hawaii; after public notice was given in the Hawaii State & County Public Notices on April 12, 1999.

They shall take effect ten days after filing with the Office of the Lieutenant Governor.

ROBERT E. OYAMA
Chairperson
Procurement Policy Board

RAYMOND H. SATO
State Comptroller

APPROVED:

BENJAMIN J. CAYETANO
Governor
State of Hawaii

Date: _____

Filed

APPROVED AS TO FORM:

Deputy Attorney General

EXHIBIT

PROCUREMENTS EXEMPT FROM CHAPTER 103D, HRS
06/01/99

<u>Exemption Number</u>	<u>Exemption</u>
1.	Services of expert witnesses for potential and actual litigation of legal matters involving the State, its agencies, and its officers and employees, including administrative quasi-judicial proceedings;
2.	Works of art for museum or public display;
3.	Research, reference, and educational materials including books, maps, periodicals, and pamphlets, which are published in print, video, audio, magnetic, or electronic form;
4.	Meats and foodstuffs for the Kalaupapa settlement;
5.	Cultural and artistic presentations;
6.	Goods and services for resale by the State;
7.	Services of printers, rating agencies, support facility providers, fiscal and paying agents, and registrars for the issuance and sale of the State's or counties' bonds;
8.	Services of lecturers and speakers;
9.	Services of legal counsel, guardian ad litem, psychiatrists, and psychologists, when required by court order, or by the Rules of Court in the case of interpreters, in criminal and civil proceedings;
10.	Fresh meats and produce;
11.	Insurance or insurance broker services;
12.	Animals and plants;
13.	New or used items which are advantageous and available on short notice through an auction, bankruptcy, foreclosure, etc.;

Exemption

<u>Number</u>	<u>Exemption</u>
14.	Food and fodder for animals;
15.	Facility costs for conferences, meetings, and training sessions;
16.	Advertisements in specialized publications, such as in ethnic or foreign language publications, trade publications, professional publications;
17.	Professional consultant services as required under Chapter 658, HRS;
18.	Interpreter services;
19.	Procurement of repair services when dismantling is required to assess the extent of repairs;
20.	Burial services consisting of mortuary, crematory, cemetery, and other essential services for deceased indigent persons or unclaimed corpses; and
21.	Radio and television airtime when selection of station is to be made by current audience demographics.